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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ANASTASIA SHAMINA,  
Plaintiff and Appellant,

v.

YEVGENIY URDENKO,  
Defendant and Respondent.

A125613

(Alameda County  
Super. Ct. No. HG06280384)

**I. INTRODUCTION**

Appellant Anastasia Shamina (Shamina) brought this civil action against her former husband, respondent Yevgeniy Urdenko (Urdenko), for rape, assault, and battery. A jury found against her and in favor of Urdenko. Shamina appeals from the judgment, asserting evidentiary errors, misconduct on the part of Urdenko's counsel, and insufficient evidence. We affirm.

**II. FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>**

Shamina and Urdenko met in Russia in the mid-1990s. Shamina moved to Germany in 1998 to study at the University of Osnabrueck. Urdenko was married in 1998 and moved to the United States around 1999, with an H-1B worker's visa from

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<sup>1</sup> Our factual recitation acknowledges the substantial evidence standard of review, which applies to Shamina's challenge to the sufficiency of the evidence.

Seva Technology. H-1B visas are nonimmigrant visas for specialized workers with a college degree that can be adjusted for permanent residency.

In March 2004, Urdenko called Shamina from the United States seeking information for a relative about studying in Germany. During this conversation, Shamina inquired about Urdenko's immigration status and asked if Urdenko knew "any U.S. citizen who can make [a] fake marriage in [the] United States." Urdenko was in the process of a divorce, and she suggested they marry, telling him "you need some care, you shouldn't be alone . . . I can be good person to help you to recover after the divorce." Urdenko's divorce was final in April 2004.

Shamina researched American visa and immigration processes online, and told Urdenko she had researched the requirements for obtaining a visa to come to the United States. She accessed the "Internet German page . . . on [the] U.S. embassy site in Germany . . . ." She also had an account and screen name with a Russian Web site called "Privet," which had information about the Russian community. Shamina testified she was "not sure" if the site provided information about how to come to America, and claimed she rarely accessed it.

On May 19, 2004, Shamina informed Urdenko she believed she had to go to Berlin to be interviewed at the U.S. Consulate to obtain a U.S. visa. Urdenko sent her a letter in Germany with information she could show U.S. authorities in order to immigrate to the United States.

In August 2004, Urdenko went to visit Shamina in Germany. On that trip, they got married in Denmark. Shamina explained "in Europe Denmark is kind of Las Vegas . . . you can get married pretty quick." Urdenko returned to the United States, but Shamina remained in Germany. She did not come to the United States until November 4, 2004, and did so for her immigration medical exam scheduled on November 5, 2004. The couple signed and submitted immigration papers by November 9, and Shamina returned to Germany on January 11 or 12, 2005.

Shamina returned to the United States on February 27, 2005, to attend an immigration interview with Urdenko scheduled for March 1, 2005. At that meeting, the

immigration officer doubted the legitimacy of their marriage and gave the couple 86 days to provide proof. Shamina asked friends to send postcards from Europe to their San Jose address. Urdenko obtained a Netflix subscription and made an Amazon purchase in Shamina's name, and they bought a condominium in Shamina's name to prove the marriage was legitimate. They moved into the condominium around May 1, 2005.

Shamina and Urdenko's relationship in the United States was troubled and they fought often. At their housewarming party on May 7, 2005, Shamina broke a wine glass over Urdenko's head in front of their guests because she felt he was ignoring her, causing his forehead to bleed. Vera Sokolova, a guest at the party, testified Shamina told her she married Urdenko in a hurry because her German visa was about to expire and she did not want to return to Russia. Shamina complained to Sokolova about Urdenko not paying enough attention to her, and Sokolova advised Shamina to be patient. Shamina replied she did not want to be patient and she had "another plan."

On May 10, 2005, Urdenko came home with beer and an inflatable sex doll. He became intoxicated, and made some telephone calls. The parties sharply dispute what happened after that.

Shamina claimed Urdenko went out on their balcony and started climbing over the railing. She went to the balcony and "grabbed him by his . . . shirt to push him back." She called one of Urdenko's friends for help, but his friend's wife answered the phone and said he would not help. Urdenko then took off all his clothes and "said that he want[ed] to have sex." Shamina yelled to leave her alone, ran into the office, and locked the door, but Urdenko broke it down. She testified he grabbed her by the hair and said he wanted sex. Urdenko "forced—his penis inside of [her]" for a "couple of seconds, and then he lost his erection." He became angry, forced his penis into her mouth, and threatened to kill her if she did not have anal sex with him. They fought for about 10 minutes until she was able to run away to her neighbor's house.

Urdenko denied doing any of these acts. He testified he and Shamina had three fights that day. The first occurred when she scratched him after he assembled the doll. The second fight was because Shamina wanted their bathtub replaced instead of repaired.

Urdenko ran out to their balcony to get away from her, and climbed over the railing. The third fight was after Urdenko got out of the shower. He was naked and headed to the bedroom when Shamina “blocked [his] entrance” and started scratching him after he said he did not want to talk to her. Urdenko, who was drunk after drinking beer all afternoon, ran away and fell asleep on the floor.

Michael and Brenda Donegan were the couple’s next-door neighbors, but did not know them. Michael testified Shamina came to their home that evening, and was crying and appearing to be genuinely upset and fearful. Brenda testified Shamina was crying and upset, and told her Urdenko was hitting her and trying to kill her. Neither of the Donegans had heard sounds of the struggle from their apartment. Michael called the police.

When the police arrived, they interviewed Shamina. They then went to the couple’s home and arrested Urdenko, who was asleep on the floor, naked and unresponsive. After the police woke him up, Urdenko told them he had no recollection of the events of that evening. Urdenko told police “his wife was a good person, that she doesn’t lie, and whatever she said would be truthful.” He did not know at the time Shamina had accused him of rape.

Urdenko called Shamina from jail after the incident “apologizing and trying to persuade [her] to stay in the United States, don’t file for divorce.” He wrote Shamina a letter in which he said he felt sorry for her and ashamed of what he had done. At trial, Urdenko testified he meant he was ashamed he “didn’t do my best to give our marriage and stay together.” He also indicated he needed Shamina’s help to remember what happened on May 10. Urdenko’s letter mentioned their fights, and stated “Not even once have I tried to attack in response.” When he stated in the letter “what I have committed was not revenge,” he was referring to his purchase of the inflatable sex doll.

The police took Shamina to the emergency department of Highland Hospital, where she was examined by a physician assistant, Martin Moran. Shamina had tenderness in several areas, including her genital area, forehead, and neck, and redness around her rectum and on her forehead. The examination results and the patient history

recited by Shamina were consistent with the report of physical and sexual assault. Moran conceded the examination was not entirely objective as the reported “tenderness” refers to the examiner touching an area and the patient expressing pain; there is no objective “scan” or test for tenderness. It also would have been possible for Shamina to have caused the redness herself.<sup>2</sup>

In August 2005, Shamina testified in the parties’ dissolution action she was “in the process of getting a U type visa. This is the visa for the victim of criminal actions.” Also that month, Shamina began seeing psychotherapist Svetlana Theimer through the Victim/Witness program. Theimer testified Shamina’s symptoms were consistent with those of people who had been exposed to domestic violence.<sup>3</sup> She agreed that the Minnesota Multiphasic Inventory was considered the “gold standard in psychological testing,” but she did not administer it or any other test to Shamina.

Criminal charges were brought against Urdenko, and the case went to trial before a jury. The jury failed to reach a verdict, and the case was dismissed in 2007.

Shamina then filed this civil action against Urdenko, realleging her accusations of assault and rape, and seeking damages. The jury in the civil action did reach a verdict, finding Urdenko not liable for the alleged torts. The trial court denied Shamina’s motions for judgment notwithstanding the verdict and, alternatively, a new trial. This timely appeal followed.

### **III. DISCUSSION**

#### ***A. The Trial Court Did Not Err in Admitting and Excluding Evidence***

Shamina contends the trial court erred in (a) admitting evidence about her immigration status and sexual conduct and (b) excluding evidence about Urdenko’s prior

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<sup>2</sup> Photographs of both Urdenko and Shamina taken after the incident and showing their claimed injuries were introduced into evidence and published to the jury.

<sup>3</sup> Following a Evidence Code section 402 hearing, the court ruled Theimer could not testify about any statements made to her by Shamina. While Shamina stated at oral argument Theimer testified Shamina had posttraumatic stress disorder, Theimer only stated that at the Evidence Code section 402 hearing, not during her trial testimony.

arrest and his testimony in their divorce proceedings. We review these evidentiary rulings for abuse of discretion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 929-930.)

***1. The Trial Court Did Not Abuse Its Discretion in Permitting Evidence of Shamina's Immigration Status***

Shamina argues the court abused its discretion under Evidence Code section 352<sup>4</sup> in denying her motion to exclude evidence of her immigration status. This evidence consisted of the following: At the time of the incident Shamina held an H-4 visa, which is issued to dependants of an H-1B visa holder (as was Urdenko). In January 2006, she applied for a U visa, also called a victim's visa, which she obtained and had at the time of the civil trial. A U visa allows victims of crimes such as domestic violence to stay in the United States on a protected status, even if they are otherwise ineligible.

Our review of the court's exercise of its discretion under section 352 is highly deferential. (*People v. Hamilton, supra*, 45 Cal.4th at pp. 929-930.) The trial court may exclude evidence if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) In exercising its discretion under section 352, a trial court is called upon to determine the probative value of the challenged evidence. Probative value is determined by three major elements: relevance, materiality, and necessity. (*People v. Lang* (1989) 49 Cal.3d 991, 1049 (conc. & dis. opn. of Mosk, J.).)

Shamina's immigration status was highly relevant to Urdenko's defense theory that Shamina staged the purported rape in an attempt to obtain a victim's visa. At the time of the incident, the couple had been given a deadline by which to prove their marriage was legitimate. Shamina's visa was wholly dependent on the legitimacy of her marriage to Urdenko. A victim's visa would allow Shamina to remain in the United

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<sup>4</sup> All further statutory references are to the Evidence Code.

States, regardless of whether her marriage was legitimate or whether she remained married to Urdenko.

The evidence of Shamina's quest to obtain some kind of immigration visa was, indeed, prejudicial to her case. But the prejudice targeted by section 352 "is not the prejudice or damage . . . that naturally flows from relevant, highly probative evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Rather, for purposes of section 352, prejudice is defined as " 'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.' " (*People v. Karis*, at p. 638.)

Shamina claims evidence of her immigration status was inherently prejudicial, relying on *Rodriguez v. Kline* (1986) 186 Cal.App.3d 1145, 1148 (*Rodriguez*) and *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463 (*Hernandez*), disapproved on other grounds in *People v. Freeman* (2010) 47 Cal.4th 993, 1006, footnote 4.<sup>5</sup> Neither case aids Shamina. In *Rodriguez*, evidence of the plaintiff's illegal immigration status was admitted at trial. Because the plaintiff was subject to deportation to Mexico where wages were lower, his illegal immigration status was relevant to any award of damages. (*Rodriguez*, at pp. 1147-1150.) This reaffirms that if immigration status is relevant to an issue in the case, it can be considered by the jury. In *Hernandez*, a medical malpractice case, the defendant physician sought to introduce plaintiff's alien status as character evidence to show a propensity to lie. (*Hernandez*, at pp. 454, 458.) The court held plaintiff's immigration status had no relevance to the doctor's liability, and no probative

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<sup>5</sup> Shamina also relies on two out-of-state cases, neither of which are apposite nor binding on this court. In *Salas v. Hi-Tech Erectors* (2010) 168 Wash.2d 664, the court held the plaintiff's illegal immigration status was relevant but, in the circumstances of that case more prejudicial than probative. (*Id.* at pp. 670, 672.) The court in *Gonzalez v. City of Franklin* (Wis. 1987) 403 N.W.2d 747 also excluded evidence of plaintiff's illegal immigration status as too prejudicial. (*Id.* at pp. 751-752.) In contrast, Shamina had a visa and was in the United States legally.

value regarding plaintiff's veracity. (*Id.* at pp. 455, 460.) As we have discussed, that is not the case here. Evidence of Shamina's immigration status and her efforts to change it was pivotal to Urdenko's defense that her claims of rape and assault were fabricated.

Shamina complains the trial court did not read her in limine motion and thus did not weigh the probative value of the evidence against the danger of prejudice. Although the trial court did not review her written motion, it did consider her oral motion. The matter was fully argued, and the court ruled from the bench—no more was required.

Shamina further complains the court did not state on the record it had weighed the probative value of the evidence against its potential prejudice. Shamina misinterprets the requirements of section 352. Our Supreme Court has recognized that when ruling on a motion to exclude, it is not necessary for the court to expressly weigh, or state that it has weighed, the probative value with the danger of undue prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) We presume the trial court duly exercised its discretion under section 352. (*People v. Castro* (1986) 186 Cal.App.3d 1211, 1218.)

## ***2. The Trial Court Properly Allowed Evidence of Shamina's Sexual Preferences and History***

Shamina argues evidence of her own sexual conduct was improperly admitted, relying on section 783. Section 783 provides that in a civil action for sexual assault, evidence of the plaintiff's sexual conduct to attack the plaintiff's credibility must be submitted by way of a written motion and ruled on by the judge. (§ 783.)

However, Shamina *herself* first introduced evidence of her sexual preferences and conduct, thus bringing this evidence squarely within the purview of section 1106. That section applies to "any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery," and provides, "If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited



specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff.” (§ 1106, subds. (a), (c).)

Even if section 1106 did not apply, “it is settled that where a party by his conduct induces the commission of an error, under the doctrine of invited error he is estopped from asserting the alleged error as grounds for reversal.” (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.) Thus, when a party offers evidence that otherwise would have been inadmissible, he or she waives the right to object on appeal. (*Gjurich v. Fieg* (1913) 164 Cal. 429, 433; 9 Witkin Cal. Procedure (5th ed. 2008) Appeal, § 390.)

The first mention of the inflatable sex doll was made by Shamina’s attorney in his opening argument. Then, under direct examination by her own counsel, Shamina testified in detail about the inflatable sex doll Urdenko bought and testified about how embarrassed and hurt she was about this event. Her attorney also questioned her about Urdenko’s statement in his deposition that he told some of his friends Shamina was a “whore.” Shamina testified in response to her counsel’s questions she did not approve of sex toys and found foreign sex objects disgusting. Shamina’s counsel also called Urdenko as a witness under section 776, and questioned him about the couple’s sexual history and visits to several sex shops. Thus, even if the sexual evidence was not relevant, Shamina cannot complain about this evidence on appeal, since she adduced it. Furthermore, the evidence had some relevance because Shamina put her sexual preferences at issue when she claimed disgust with Urdenko’s sexual habits, presumably to bolster her claim he had assaulted and raped her.

Shamina further complains the trial court erred in denying her motion to exclude the testimony of Aleksey Bogdanov, her boyfriend from 2006 to 2007. Before trial, Shamina moved to exclude the testimony of 26 witnesses proposed by Urdenko, including that of Bogdanov, on the ground it would waste the court’s time. Urdenko’s counsel stated Bogdanov would testify about “a financial impropriety the plaintiff asked him to engage in, that is, taking money from defendant, and basically, hiding it shortly

after the incident . . . [and] plaintiff's aggressiveness, in general, in the relationship." The trial court denied Shamina's motion to exclude all 26 witnesses, but advised Shamina if there were evidentiary issues, she should object at trial.

Before Bogdanov testified, Shamina's own counsel introduced evidence of allegations she was a former prostitute. Specifically, he questioned Urdenko about his deposition testimony in which he stated Shamina had been a prostitute and "was kind of proud of it." Bogdanov then testified on direct examination about his relationship with Shamina, including her alleged prostitution, a sex toy he gave her, and her reaction to the toy. Shamina's counsel made no objection to this testimony. Furthermore, on cross-examination, her counsel questioned Bogdanov further about sexual topics.

Generally, the improper admission of evidence cannot be challenged on appeal unless there "appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (§ 353, subd. (a).) A motion in limine suffices for this purpose if: "(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (*People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) If a motion in limine fails to satisfy any of these requirements, a proper objection is required to preserve an evidentiary issue for appeal. (*Ibid.*)

Shamina's in limine motion to exclude the testimony of 26 of Urdenko's potential witnesses because it would "waste the court's time" was not sufficiently specific to preserve a section 783 objection to Bogdanov's testimony. Indeed, the trial court ruled Shamina had to make any evidentiary objections to the listed witnesses' testimony at the time the evidence was introduced and she could not rely on her omnibus motion. Furthermore, as we set forth above, Shamina herself either opened the door to or elicited

Bogdanov’s testimony. Thus, any error in admitting the evidence was either waived or invited by Shamina herself, and she is foreclosed from challenging its admission on appeal.

***3. The Trial Court Properly Excluded Alleged Inconsistent Testimony By Urdenko in the Divorce Case***

Shamina further argues the trial court erred in excluding evidence of inconsistencies between Urdenko’s testimony in this case and evidence in their divorce case. She claims in the divorce proceedings, Urdenko asserted she fabricated the alleged rape to “take all his money and flee the country,” and he “had no money . . . when in fact he paid his attorneys over \$50,000.” Shamina also claims Urdenko testified in the divorce proceedings he purchased the couple’s home in his own name, while in this case he testified it was purchased in both their names.

The trial court excluded all evidence concerning the divorce proceedings in the interest of time and relevancy, indicating it did not want to retry the proceedings. “While collateral matters are admissible for impeachment purposes, the collateral character of the evidence reduces its probative value and increases the possibility that it may prejudice or confuse the jury.” (*People v. Laverne* (1971) 4 Cal.3d 735, 742.) Given the already considerable evidence at trial, the trial court did not abuse its discretion in excluding this collateral evidence.

***4. The Trial Court Properly Excluded Evidence of Urdenko’s Prior Arrest***

Shamina finally asserts Urdenko’s arrest for alleged sexual assault of his first wife—charges for which were never filed—should have been admitted to show a “pattern of . . . violent behavior against his spouses.” Evidence of uncharged crimes is governed by section 1101,<sup>6</sup> which prohibits character evidence to show the defendant committed a

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<sup>6</sup> “While section 1101 usually arises in criminal cases, the statute applies in civil cases as well.” (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 928-929, fn. 10.)

crime, except when relevant to proving a fact such as “motive, opportunity, [or] intent.” (§ 1101, subds. (a), (b).) “[E]vidence of a defendant’s prior bad acts or bad character is generally inadmissible to prove a propensity or disposition to engage in conduct on a specified occasion.” (*Holdgrafer v. Unocal Corp.*, *supra*, 160 Cal.App.4th at pp. 928-929.) There was no issue here as to Urdenko’s motive, opportunity, or intent. Rather, Shamina offered the evidence solely to show Urdenko’s purported propensity to assault women and his spouse, in particular, and as such, the evidence was properly excluded.

***B. There Was No Improper Conduct By Defense Counsel***

Shamina asserts Urdenko’s counsel improperly discussed the “victim’s visa” during opening statement and closing argument to inflame the jury. She further contends Urdenko’s counsel misrepresented Bogdanov’s testimony.

In order to raise improper conduct by counsel on appeal, the record must show the party made “a timely and proper objection and a request that the jury be admonished.” (*Horn v. Atchison, T. & S. F. Ry. Co.* (1964) 61 Cal.2d 602, 610.) If no objection is made, the issue is waived. (*Ibid.*)

During his opening statement and closing argument, Urdenko’s counsel discussed the defense theory and evidence of Shamina’s “plan . . . to stage a rape . . . to obtain what’s called a victim’s visa.” Shamina’s counsel did not object, and thus any issue of misconduct has been waived on appeal. Further, as for Bogdanov’s deposition testimony (which was read to the jury), Shamina’s own counsel introduced the information about which Shamina now complains.

Even if these issues were preserved by proper objection and request for admonishment, there was no misconduct on the part of Urdenko’s counsel. First, Urdenko’s theory of a staged rape as part of a quest for a victim’s visa was highly relevant to his defense, and in his closing argument, Urdenko’s counsel reviewed evidence to support this theory. Second, since the trial court properly allowed

Bogdanov's testimony, Urdenko's counsel did not engage in any misconduct in discussing it during closing argument.

***C. Substantial Evidence Supports the Verdict***

Finally, Shamina contends no substantial evidence supports the verdict. Our standard of review in this regard is well established. We review the record in the light most favorable to the prevailing party and the judgment below. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.) "Substantial evidence" is evidence that is reasonable, credible, and of solid value. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164.) The testimony of a single witness, even the party himself or herself, may be sufficient. (*Chodos v. Insurance Co. of North America* (1981) 126 Cal.App.3d 86, 97; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 369.) We affirm if a "reasonable trier of fact could find that the judgment and each essential element thereof was established by the appropriate burden of proof." (*Rivard v. Board of Pension Commissioners* (1985) 164 Cal.App.3d 405, 414.)

Shamina asserted at oral argument her case was more believable. She pointed to evidence of Urdenko's apology, her neighbors' and therapist's testimony, and photographs taken after the incident of each person's claimed physical injuries. She also claimed Urdenko was simply not credible. However, it is for the trier of fact to weigh the evidence and determine whether a case has been proven by a preponderance of the evidence. Here, the jurors evaluated the testimony of the witnesses and assessed the other evidence. We are a court of review and cannot retry issues submitted to the jury, or "substitute our evaluation of a witness's credibility for that of the factfinder." (*People v. Snow* (2003) 30 Cal.4th 43, 66, citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see *Primm v. Primm* (1956) 46 Cal.2d 690, 693-694.)<sup>7</sup>

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<sup>7</sup> Because we conclude substantial evidence supports the verdict, we also find no error in the denial of Shamina's motion for judgment notwithstanding the verdict, to which we apply the same standard of review: we affirm if "there is any substantial

#### IV. DISPOSITION

The judgment is affirmed. Respondent is to recover his costs on appeal.

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Banke, J.

We concur:

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Marchiano, P. J.

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Dondero, J.

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evidence, contradicted or uncontradicted, supporting the jury's verdict." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.)